

1987

# Salt Lake City v. Mark Mitchell Miller : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Roger F. Cutler; Salt Lake City Attorney; Cecelia Espenosa; Assistant Salt Lake City Prosecutor; Attorney for Respondent.

Lynn C. Donaldson; Salt Lake Legal Defender Association; Attorney for Appellant.

---

## Recommended Citation

Brief of Respondent, *Salt Lake City v. Mark Mitchell Miller*, No. 870286 (Utah Court of Appeals, 1987).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/512](https://digitalcommons.law.byu.edu/byu_ca1/512)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

870286-CA IN THE COURT OF APPEALS

OF THE STATE OF UTAH  
-----

SALT LAKE CITY	)	Case No. 870286-CA
	)	
Plaintiff-Respondent	)	Appeal Priority 2
	)	
vs.	)	
	)	
MARK MITCHELL aka MILLER,	)	
	)	
Defendant-Appellant.	)	

---

BRIEF OF RESPONDENT

---

Appeal from a conviction and judgment on one  
count of Vehicle Molestation in the  
Fifth Circuit Court, in and for Salt Lake County,  
State of Utah,  
the Honorable Robert C. Gibson, Judge, presiding

---

ROGER F. CUTLER  
Salt Lake City Attorney  
CECELIA M. ESPENOZA  
Assistant Salt Lake City  
Prosecutor  
451 South 200 East, Room 125  
Salt Lake City, Utah 84111  
Telephone: (801) 535-7767  
Attorney for Respondent

LYNN C. DONALDSON  
Salt Lake Legal Defender  
Association  
333 South Second East  
Salt Lake City, Utah 84111  
Attorney for Appellant

**FILED**

**JAN 6 1988**

870286-CA

Timothy M. Shea  
Clerk of the Court  
Utah Court of Appeals

IN THE COURT OF APPEALS  
OF THE STATE OF UTAH  
-----

SALT LAKE CITY	)	
	)	Case No. 870286-CA
Plaintiff-Respondent	)	
	)	Appeal Priority 2
vs.	)	
	)	
MARK MITCHELL aka MILLER,	)	
	)	
Defendant-Appellant.	)	
	)	

---

BRIEF OF RESPONDENT

---

Appeal from a conviction and judgment on one  
count of Vehicle Molestation in the  
Fifth Circuit Court, in and for Salt Lake County,  
State of Utah,  
the Honorable Robert C. Gibson, Judge, presiding

---

ROGER F. CUTLER  
Salt Lake City Attorney  
CECELIA M. ESPENOZA  
Assistant Salt Lake City  
Prosecutor  
451 South 200 East, Room 125  
Salt Lake City, Utah 84111  
Attorney for Respondent

LYNN C. DONALDSON  
Salt Lake Legal Defender  
Association  
333 South Second East  
Salt Lake City, Utah 84111  
Attorney for Appellant

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUE.....	iv
JURISDICTIONAL STATEMENT.....	iv
STATEMENT OF THE CASE.....	1
FACTS.....	2
ARGUMENT	
POINT I	
THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE.....	5
A. APPELLANT WAS NOT SURPRISED BY WITNESS LESLIE SORRELS.....	6
B. APPELLANT'S ALLEGED IMPEACHMENT OF MS. SORRELS WOULD NOT BE ALLOWED; THUS, APPELLANT-MITCHELL HAS FAILED TO SHOW AN ABUSE OF JUDICIAL DISCRETION OR PREJUDICE.....	9
POINT II	
APPELLANT-MITCHELL WAS NOT DENIED DUE PROCESS BY THE PROSECUTION'S VOLUNTARY DISCLOSURE OF AN INCUHPATORY WITNESS AT THE FIRST OPPORTUNITY.....	11
CONCLUSION.....	15

## TABLE OF AUTHORITIES

### CASES CITED

<u>Brady v. Maryland</u> , 373 U.S. 83 (1963).....	12
<u>Moore v. Illinois</u> , 408 U.S. 786 (1972) reh.den. 409 U.S. 897 (1972).....	12, 13
<u>State v. Adams</u> , 583 P.2d 89 (Utah 1978).....	14
<u>State v. Banner</u> , 717 P.2d 1325 (Utah 1986).....	11
<u>State v. Carter</u> , 707 P.2d 656 (Utah 1985).....	14
<u>State v. Creviston</u> , 646 P.2d 750 (Utah 1982).....	5, 7
<u>State v. Fierst</u> , 692 P.2d 751 (Utah 1981).....	14
<u>State v. Freshwater</u> , 30 Utah 442, 85 P. 447 (1906).....	7
<u>State v. Gaines</u> , 435 P.2d 68 (Ariz.App. 1967).....	7
<u>State v. Greene</u> , 38 Utah 389, 115 P. 181 (1910).....	9
<u>State v. Hodges</u> , 30 Utah 2d 367, 517 P.2d 1322 (1974).....	5
<u>State v. Jarrell</u> , 608 P.2d 218 (Utah 1980).....	14
<u>State v. Knight</u> , 734 P.2d 913 (1987).....	4, 6, 15
<u>State v. Marks</u> , 16 Utah 204, 51 P. 1089 (1898).....	9
<u>State v. Moosman</u> , 542 P.2d 1093 (Utah 1975).....	5
<u>State v. Moraine</u> , 475 P.2d 831 (Utah 1970).....	6, 8, 15
<u>State v. Pierre</u> , 572 P.2d 1338 (Utah 1977).....	11
<u>State v. Schaffer</u> , 725 P.2d 1301 (Utah 1986).....	13
<u>State v. Sparks</u> , 672 P.2d 92 (Utah 1983).....	8
<u>State v. Workman</u> , 635 P.2d 49 (Utah 1981).....	12, 13

STATUTES CITED

<u>Revised Ordinances of Salt Lake City</u>	
Section 32-3-8.....	1
<u>Utah Code Annotated</u> Section 609(a)2.....	10
<u>Utah Code Annotated</u> Section 609(b).....	10
<u>Utah Code Annotated</u> Section 77-35-2.....	5
<u>Utah Code Annotated</u> Section 77-35-16.....	2
<u>Utah Code Annotated</u> Section 77-35-16(g).....	8
<u>Utah Code Annotated</u> Section 78-24-11.....	9

### STATEMENT OF ISSUE

Does a trial court abuse discretion when it denies appellant's request for continuance if the appellant had a knowledge of the witness prior to the date of trial?

### JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this court under Section 77-35-26(2)(a) Utah Code Ann. (1953 as amended) and Section 78-2a-3(2)(c) Utah Code Ann. (1953 as amended) whereby a defendant in a criminal case may take an appeal to the Court of Appeals from a final judgment of conviction of a class B misdemeanor rendered in a circuit court. In this case, defendant was convicted by a jury before the Honorable Robert C. Gibson, Fifth Circuit Court, Salt Lake County, Utah.

IN THE COURT OF APPEALS  
OF THE STATE OF UTAH  
-----

SALT LAKE CITY,	)	
	)	BRIEF OF RESPONDENT
Plaintiff-Respondent,	)	
	)	Case No. 870286-CA
vs.	)	
	)	
MARK MITCHELL aka MILLER,	)	
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

This is an appeal from a judgment against Mark Mitchell aka, Miller, for one count of vehicle molestation, a class B misdemeanor, in violation of Section 32-3-8, Revised Ordinances of Salt Lake City. A jury found Mr. Mitchell guilty of vehicle molestation and not guilty of disturbing the peace at the end of a one-day trial on May 18, 1987.

Judge Robert C. Gibson sentenced Mr. Mitchell on June 22, 1987. The defendant was ordered to serve 180 days in jail, with all but 30 days suspended; pay \$500.00 in attorney's fees; pay \$549.00 in restitution; and be on probation to Adult Probation and Parole for one year. The terms of probation are that the defendant complete a substance abuse counseling program, get a full-time job, avoid contact with known drug users, and complete forty hours of community service.



### FACTS

The facts, when viewed in a light favorable to upholding the jury verdict demonstrate:

1. The defendant, Mark Mitchell aka Mark Miller, was charged with Vehicle Molestation and Disturbing the Peace, both class B misdemeanors by information issued December 22, 1986. (R. 59).

2. Appellant-Mitchell appeared for arraignment and indicated that his true name was Mark Mitchell. He was appointed counsel through the Legal Defenders Association. His attorney, Lynn Donaldson filed an appearance of counsel and request for discovery pursuant to Section 77-35-16 U.C.A., on February 4, 1987. In response to the discovery request the Salt Lake City Prosecutors office delivered a formal information and police report to the Legal Defendants office. The police report listed the only known witness to the offense, the victim Mr. Roosevelt Willburn. (R.R. 1).<sup>1</sup>

3. No further requests or motions regarding the discovery were filed by the defense. A pretrial conference was scheduled for March 19, 1987. The City and defense counsel were present, but the defendant failed to appear. A second pretrial conference was held April 2, 1987. No resolution was reached and the case was set for trial May 18, 1987. (Addendum 2).

<sup>1</sup> R.R. refers to the Revised Record pages submitted pursuant to stipulation of the parties attached as Addendum 1.

4. On May 18, 1987, the day of the trial, the victim, Roosevelt Willburn, appeared in the prosecution's office pursuant to a subpoena. At that time he also brought Ms. Leslie Sorrel in to the office. Upon questioning by the prosecutor it was determined that Ms. Sorrels was an eyewitness to the offense charged against the defendant. (R.R. 2).

5. Ms. Sorrels further testified that she came into trial that morning because she had been asked by the victim Willburn to come and tell what she saw. (R. 45). However, she first notified the victim that she had witnessed the incident approximately one week before May 5, 1987, when she testified in small claims court. (R. 45).

6. Immediately following discovery of the witness by the prosecution and pursuant to the continuing duty to disclose, Prosecutor Cecelia M. Espenosa, telephoned the defendant-Mitchell's counsel and indicated that Ms. Sorrels had appeared and would be called as a witness for the prosecution. (R.R. 2).

7. During the trial, two witnesses were called by the City. The victim, Mr. Roosevelt Willburn and Ms. Sorrels. Mr. Willburn identified the defendant as an individual he had known as Mark Miller. (R. 22). Mr. Willburn saw the defendant with a tire iron in his hand immediately after he heard a knock on the door and looked out the window. (R. 25). Mr. Willburn testified that he left his room, saw the

defendant break his windshield and that he was then threatened by defendant with a knife, which caused him to return to his room. (R. 24; 26).

8. Ms. Sorrels testified to essentially the same facts. She was also at the Aquarius Motel on the date of the incident. (R. 37). That she knew both parties, Mr. Mitchell and Mr. Willburn; she heard a crash, looked out the window and saw both men. (R. 38, 40, 41). She also observed the victim being chased back into his room by defendant, Mark Miller (Mitchell). (R. 41). She believed she saw a knife in the defendant's hand (R. 43).

9. Appellant-Mitchell testified in his own defense. He asserted that he was not present on the date of the occurrence. He presented no alibi witness or evidence. (R. 54).

10. At trial May 18, 1987, defendant-Mitchell moved to have Ms. Sorrels testimony excluded based upon State v. Knight, 734 P.2d 913 (Utah 1987). (R. 1). The Court denied that motion and defendant's motion to continue or dismiss the case (R.R. 2).

11. The case was then presented to a jury and defendant-Mitchell was found guilty of Vehicle Molestation and not guilty of Disturbing the Peace. (R. 98).

## ARGUMENT

### POINT I

THE COURT DID NOT ABUSE ITS DISCRETION  
IN DENYING APPELLANT'S MOTION FOR  
CONTINUANCE.

Trial judges are granted broad discretion in managing cases and granting continuances. It will be overturned only if there is a clear abuse. The applicable statutory law provides in pertinent part:

(b) When an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion:

(1) With or without motion or notice, order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order; . . . 77-35-2 Utah Code Ann., 1953 (emphasis added).

In interpreting this standard, the Utah Supreme Court said:

It is well established in Utah, as elsewhere, that the granting of a continuance is at the discretion of the trial judge, whose decision will not be reversed by this Court absent a clear abuse of that discretion. State v. Creviston, 646 P.2d 750, 752 (Utah 1982) citing State v. Moosman, 542 P.2d 1093 (Utah 1975).

Thus, it is clear Utah law that an appellate court will not substitute its decision for that of the trial judge in the absence of a demonstration of manifest abuse of discretion. State v. Hodges, 30 Utah 2d 367, 517 P.2d 1322 (1974).

In the present case, appellant-Mitchell's motion for continuance was based, at trial upon State v. Knight, 734 P.2d 913 (Utah 1987), which appellant has now abandoned in his brief. The reasons for Knight's inapplicability to this case are addressed in Point II, infra. However, as demonstrated below, it is clear that appellant has failed to establish any law or evidence to support a claim of an abuse of judicial discretion warranting remand or reversal.

A. APPELLANT WAS NOT SURPRISED BY WITNESS  
LESLIE SORRELS

Appellant-Mitchell alleges that the Court abused its discretion, in denying his Motion for Continuance, because a surprise witness was called to his substantial prejudice. However, the record does not support appellant's claims of surprise or prejudice.

For example, appellant-Mitchell's own counsel stated: "we were familiar with her name" and ". . . I did try to contact Mrs. Sorrels over the weekend [before trial]. I just had a real vague address . . ." (R. 1, 2) (Emphasis added). From these admissions it is clear that defense counsel knew of the witness and cannot now claim surprise.

The facts in this case closely resemble State v. Moraine, 475 P.2d 831 (Utah 1970). In Moraine, no error was found in the trial court allowing the state to introduce inculpatory statements of the defendants. Similar to the case at bar, the defendant knew of the statements before

trial; however, the Prosecutor did not know of the testimony until the "morning of trial." Thus, the lower court admitted the newly discovered witness's testimony even though not disclosed in the Bill of Particulars. Id. at 833.

The case now relied upon by appellant-Mitchell, State v. Gaines, 435 P.2d 68 (Ariz App. 1967), cited in appellant's Brief, p. 7 is factually distinguishable. There, the prosecution dismissed charges against the codefendant and called him to the stand on the morning of trial. Thus, the witness was known to the prosecution, but not the defense. However, in the case at bar, the witness was known to the defense but not the prosecution. The surprise was on the prosecution who discovered the witness only on the morning of trial and promptly notified the defense. (R. 2, 45). In fact, appellant-Mitchell's knowledge of the witness came from her testimony at a small claims hearing held approximately two weeks before trial (R. 45). The Gaines case is totally in apposite to the case here at issue.

In order for the appellant to prevail, he must show that the basis of the continuance is to produce "material and admissible testimony" subsequent to exercising "due diligence." State v. Creviston, supra, at 752, Accord: State v. Freshwater, 30 Utah 442, 85 P. 447 (1906). However, since appellant-Mitchell knew of the witness, his pretrial remedy and responsibility was to bring a motion to

continue pursuant to Utah Code Annotated, Section 77-35-16(g), which provides:

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. (Emphasis added).

In this case, appellant-Mitchell made a choice not to request an order from the court in advance of trial because he knew Ms. Sorrels testimony was inculpatory; further, appellant knew via the police report<sup>2</sup> that the City was unaware of Ms. Sorrels. When the prosecution did become knowledgeable and informed appellant's counsel, he was not surprised by the testimony or prejudiced in his defense; in point-of-fact, appellant-Mitchell only objects to truthful testimony he hoped would not come forward. (Respondent's Statement of Facts Nos. 4-8).

★ There is no abuse of discretion when a Court denies a motion to suppress made by a party who "knew or could have discovered the evidence prior to trial"; also, there is no error to admit "newly discovered evidence" which was actually within the defendant's knowledge. State v. Sparks, 672 P.2d 92 (Utah, 1983); State v. Moraine, supra at 833.

---

<sup>2</sup> See, appellant-Mitchell's Addendum "B" to his Brief.

B. APPELLANT'S ALLEGED IMPEACHMENT OF MS. SORRELS WOULD NOT BE ALLOWED; THUS, APPELLANT-MITCHELL HAS FAILED TO SHOW AN ABUSE OF JUDICIAL DISCRETION OR PREJUDICE.

Appellant claims prejudice because the testimony given by Ms. Sorrels corroborated the testimony of the victim and contradicted appellant's defense,<sup>3</sup> which was that he as not even present at the crime scene. The long established rule is that "all persons other than those excepted by statute may be witnesses." State v. Greene, 38 Utah 389, 115 P. 181 (1910). Further, impeachment on the basis of past crimes is seriously limited to avoid unfair harassment of witnesses and wrongly prejudice truthful and relevant evidence by an appeal to bias and prejudice. Utah law would have precluded appellant-Mitchell's naked attempt to impeach Ms. Sorrels on such grounds. Utah law provides:

It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor, to be detained only so long as the interests of justice require it, and to be examined only as to matters legal and pertinent to the issue. 78-24-11 Utah Code Ann., 1953. (Emphasis added).

A prior version of this statute interpreted by the Utah Supreme Court as early as 1898:

[W]as intended to allow impeachment of a witness by introduction of character evidence only so far as the witness' general character is in issue in the case. State v. Marks, 16 Utah 204, 51 P. 1089 (Utah 1898).

<sup>3</sup> Appellant-Mitchell's Brief, p. 8.



Ms. Sorrels' character was not an issue in this case.

In the present case appellant's allegation of error centers on the FBI rap sheet which was obtained subsequent to trial. Appellant claims that the rap sheet shows areas where Ms. Sorrels credibility could be impeached.

Respondent submits that had Ms. Sorrels been known to appellant as a witness counsel would request a state rap sheet from respondent. That rap sheet (Respondent's Addendum 3) would not show any convictions which could be used against the witness.

Even taking the FBI rap sheet, in the light most favorable to appellant's claims, it fails to reveal convictions which could be used to impeach the witness.

The charges noted in the FBI rap sheet must meet the standards of Utah Rules of Evidence Section 609 to have been used against Ms. Sorrels. Here convictions, occurring "more than 10 years prior" are statutorily barred 609(b) Utah Rules of Evidence.

Appellant-Mitchell argues that Ms. Sorrels has "arrests" for crimes which fall within the 609(a)(2) impeachment standards. However, Section 609 requires a conviction.

Further, there must be a finding by the Court that the probative value of admitting the evidence outweighs its prejudicial effect. Regarding this point our Supreme Court recently excluded felony convictions and reversed a lower

what the Ct would have done.

court admission of prior felony conviction for impeachment. It noted that Rule 609(a) permits "convictions" not involving honesty or false statements to be used for impeachment, but:

. . . only if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect. State v. Banner, 717 P.2d 1325, 1334 (Utah 1986) (Emphasis in original and citations omitted).

The case of State v. Pierre, 572 P.2d 1338, 1352 (Utah 1977), cited at appellant-Mitchell's Brief at p. 9, is not to the contrary. Rather, the case stands for the position that appellant must demonstrate a "reasonable probability" that the defendant would have not been convicted. Having failed to demonstrate clear abuse, appellant has failed to meet that test. As with Banner the information is excludable and prejudicial, as a matter of law.

It is, therefore, respectfully submitted that since she could not have been impeached based upon the "rap" sheet, appellant-Mitchell was not prejudiced by the Court's denial of his Motion to Continue, and there was no abuse of discretion. The conviction should be affirmed.

#### POINT II

APPELLANT-MITCHELL WAS NOT DENIED DUE PROCESS BY THE PROSECUTION'S VOLUNTARY DISCLOSURE OF AN INCUPLYATORY WITNESS, AT THE FIRST OPPORTUNITY.

Appellant-Mitchell's motions at trial were alternatively, a Motion to Exclude Ms. Sorrel's testimony or

what about assist. of counsel?

a Motion to Continue (R. 1, 2). Although both motions were properly denied by the City admits as general principle of law that error may attach if the prosecution willfully withholds information.

The law on the subject of when the withholding of evidence by the prosecution denies a defendant due process of law has been set down by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963).

In Brady the U.S. Supreme Court established the basic principle that suppression of requested and favorable material evidence by the prosecution, violates due process.

However, it is clear that the information must be within the knowledge of the prosecution and must be requested; voluntary disclosure of inculpatory evidence by the prosecution is not required. State v. Workman, (635 P.2d 49 (Utah 1981)). In Workman, the Utah Supreme Court rejected the claims of the defendant which would have required the prosecution to voluntarily disclose inculpatory evidence. The Court cited Moore v. Illinois, to establish when due process requires suppression:

The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilty or to punishment. Important then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. These are the standards by which the prosecutions'

conduct in Moore's case is to be measured.  
State v. Workman, Id. at p. 52 citing Moore  
v. Ill., 408 U.S. 786 (1972) reh. den. 409  
U.S. 897 (1972) (Emphasis added).

*yes. He made  
an initial request  
+ Knight  
established  
a continuing  
duty.*

Appellant-Mitchell has failed to establish any of these elements. Appellant made no request for the information. He knew of the witness existence and had received the police report; thus, he knew that the witness was not listed. He did not request information about her whereabouts for reasons discussed in Point I A supra. There was no surprise, except the late discovery by the prosecution of what appellant-Mitchell already knew.

Further, the evidence in question was inculpatory  
testimony of a collateral witness; thus, it was not  
favorable to the defense.

Lastly, the third prong of the test "materiality" is defined in State v. Shaffer; here, our Court observed:

[C]onstitutional materiality requires that  
there be a showing that the suppressed or  
destroyed evidence is vital to the issues of  
whether defendant is guilty of the charge and  
whether there is a fundamental unfairness  
that requires the Court to set aside the  
defendant's conviction." State v. Shaffer,  
725 P.2d 1301, 1305 (Utah 1986).

Inculpatory information, such as an additional witness, will not meet this standard of "materiality."

In the present case, the prosecution provided all it knew and more information than was statutorily required. Therefore, even if defense counsel had not received a telephone call from the prosecution on the morning of trial, the Court could have allowed Ms. Sorrels to testify.

For a case closely in point see State v. Adams, 583 P.2d 89 (Utah 1978). Here the defendant was not informed of an admission made to a police officer, but on appeal the Court found no reversible error and correctly observed:

In regard to defendant's final point: That prejudicial error was committed because the prosecution did not disclose to him that it intended to use the testimony of Officer Reit concerning defendant's admission, this is to be said: We are in agreement with the proposition that the prosecution is under an obligation to treat the defendant fairly; and that it cannot willfully suppress evidence favorable to him for the purpose of obtaining a conviction. However, as will be seen from what has been said above, there was no abuse of that principle. The defendant and his counsel were aware of what had happened; and there was no suppression of evidence involved. State v. Adams, Id. at 91; accord: State v. Jarrell, Utah 608 P.2d 218 (1980); see also State v. Carter, 707 P.2d 656 (Utah 1985), where the evidence challenged by the defendant was corroborative of the State's case.

As in the Carter case, Ms. Sorrels was not the only witness to appellant-Mitchell's conduct. Victim-Willburn, also, identified the appellant as the person he saw threatening him with a knife.<sup>4</sup> The case law is clear that the prosecution has been relieved of the obligation to provide even exculpatory information, if the record does not show that "the prosecution knew or should have known" about the information. See also, State v. Fierst, 692 P.2d 751 (Utah 1981).

---

<sup>4</sup> See respondent's Statement of Fact 7.

Unlike State v. Knight, 734 P.2d 913 (Utah 1987) cited by appellant-Mitchell, this is not a case where defendant made a motion to compel. However, even if a motion had been made, the prosecution did not know of the witness until just before trial. (See Statement of Fact Nos. 4, 5). Even if the appellant requested and received an order from the Court to disclose inculpatory information, if it is contrary to the prosecution's rights, the prosecution could have refused to honor the order and still submitted the evidence.

Where the court orders the prosecuting attorney in a bill of particulars to give matters not required by the statute, the court may excuse the failure to furnish such material by permitting the evidence to be introduced, as was done in this case. Besides, if anyone knew about the statement, it surely was the defendant himself. State v. Moraine, infra at 833. (Emphasis added).

Here, the prosecution did not know of the witness until the morning of trial, the witness was inculpatory and appellant knew about her prior to the time of trial.<sup>5</sup> Therefore, the Court properly denied appellant-Mitchell's motions.

#### CONCLUSION

The decision to grant or deny a request for a continuance is within the sound discretion of the trial court. Where the appellant knows of a witness, he cannot claim prejudice based upon surprise.

---

<sup>5</sup> See respondent's Statement of Fact, Nos. 4-6.

The testimony of witness Sorrels was admissible and not subject to impeachment, based on the evidence presented after the trial.

Finally, the prosecution was not required to provide inculpatory evidence to the appellant. The prosecution's voluntary disclosure, as soon as practical, was evidence of the good faith of the prosecution. Appellant suffered no denial of due process and therefore, the conviction should stand.

Respectfully submitted this 5<sup>th</sup> day of

January, 1988.

  
CECELIA M. ESPINOZA

## ADDENDUM 1



SALT LAKE CITY VS. MARK MILLER

The Court is in session:

Judge: Salt Lake City vs. Michael Cook.

Salt Lake City v. Mark Miller.

Ms.E: Cecelia Espenoza on behalf of the City, Your Honor.

Mr.D: Lynn Donaldson on behalf of Mark Miller. Mark is here.

Judge: You ready to proceed?

Ms.E: I believe so Your Honor.

Judge: You ready to proceed, Mr. Donaldson?

Mr.D: Yes, Your Honor

Judge: Have the jury, we'll have the jury brought in.

(Inaudible comments of Mr. Donaldson and Ms. Espenoza). Have you heard from Mr. Stevens on this other case?

Ms.E: No, your honor I haven't.

Mr.D: There is one issue maybe we should deal with before the jury come, your Honor. Apparently, the prosecution just had a witness come in this morning that we were familiar with her name, we had never known they were going to call her as a witness. And we didn't have her address or weren't able to run a rap sheet on her. Her name is Leslie Sorrell, we ask that she be excluded based on State vs. Knight.

Ms.E: Your Honor, the City would submit pursuant to State vs. Knight, that our obligation is simply to inform the Defense as soon as we know of any witnesses, of their presence and of the fact that we would be intending to call them. As soon as I found out she came in this morning, and may have positive testimony as to this case, I did call Mr. Donaldson at his office this morning and informed him of that. He said he did not have any prior

knowledge of this witness, we did not have her name listed on the police report nor did we have an address or phone for her prior to this time. I believe the City had met our burden under State vs. Knight by contacting the defense counsel as soon as we knew of that information. We do believe the testimony she would give on this case would be relevant and we do request that she be allowed to testify.

Judge: Do you have any belief or reason to believe that the City has intentionally or negligently failed to advise you of this witness?

Mr.D: No, Your Honor. I guess the only thing that we could do then would be to ask for a continuance. I know this case has sort of drug out but, I did try to contact Mrs. Sorrels over the weekend. I just had a real vague address - State Street, 48th South, I went knocking on houses and the whole bit. Wasn't able to find her.

Judge: Motion to dismiss or motion to exclude the witness from testifying in the case or a motion to continue, all of those motions are denied under the circumstances, we will proceed.

Clerk: What was the witness's first name?

Ms.E: Leslie.

Clerk: Inaudible

Judge: It doesn't appear we have the necessary number of jurors. Some of them have been straggling in. I'm probably going to have to set my jury calls for a little bit earlier to make sure they get here. I hate to inconvenience the jurors that way but if they're not going to get here, I'm going to have to do it. The Court will recess now.

## ADDENDUM 2

Bail

13/86	Case filed on 12/23/86.	LKC
	Began tracking	Review on 03/23/87 LKC
12/87	GIBSON/CKO T209 DPWOC DPNG TRIAL 2-9-87 9:30 A.M.	CKO
	TRL scheduled for 2/ 9/87 at 9:30 A in room ? with RCG	JJW
	Ended tracking of Prosecutor's Stay	JJW
3/87	GIBSON/CKO T210 DPWOC C/O REFER TO LDA (ATTY FEES)	CKO
4/87	FILED APPEARANCE OF COUNSEL LDA L DONALDSON	JLC
	FILED REQUEST FOR DISCOVERY	JLC
9/87	GIBSON/CKO/KEESLER T283 C223 DPW LYNN DONALDSON LDA TO FILE	CKO
	JURY DEMAND C/O PRE TRIAL CONFERENCE TO BE SET	CKO
3/87	JURY DEMAND FILED ON 2-10-87 - LDA.	EEM
3/87	FILED SUBPOENA	AOK
10/87	GIBSON/CKO C/O PRE TRIAL CONFERENCE 3-19-87 9:30 A.M. (LYNN	CKO
	DONALDSON & CITY NOTIFIED)	CKO
	PTC scheduled for 3/19/87 at 9:30 A in room ? with RCG	CKO
11/87	GIBSON/CKO/GEORGE T588 C1580 DNP CHERYL JOLLEY FOR LYNN	CKO
	DONALDSON. C/O BW BAIL \$505	CKO
12/87	Warrant ordered	AOK
	Bench Warrant printed	AOK
1/87	Warrant order updated	AOK
	BENCH WARRANT issued - JUDGE RCG	AOK
	Failure to comply with court order	AOK
	Bail amount ordered: 505.00	AOK
1/87	GBISON/CKO T631 C2728 DPW LYNN DONALDSON C/O RECALL BW	CKO
	C/O PRE TRIAL CONFERENCE RESET FOR 4-2-87 9:00 A.M.	CKO
	CITY NOTIFIED	CKO
	PTC scheduled for 4/ 2/87 at 9:00 A in room ? with RCG	CKO
	Warrant recalled on 03/27/87 because of Court Order	CKO
1/87	GIBSON/CKO/ESPENOZA T695 C1307 DPW LYNN DONALDSON. DEFT ADVISED.	CKO
	C/O JURY TRIAL 5-18-87 9:00 A.M.	CKO
	TRJ scheduled for 5/18/87 at 9:00 A in room ? with RCG	CKO
1/87	FILED SUBPOENA ON RETURN	JJW
1/87	GIBSON/CKO/ESPENOZA T1044 C545 T1061 C0001 T1062 C0001 DPW	CKO
	LYNN DONALDSON. A JURY OF 4 PERSONS, NAMELY 1-RUTH ANN PUTNAM,	CKO
	2-J HAROLD JONES 3-MAE JEANNINE OHRN AND 4-HEIDI RIGBY BECK	CKO
	WERE SWORN AND IMPANELED. DEFTS MOTION C/O WITNESSES EXCLUDED.	CKO
	CITY WITNESSES LESLIE SORRELS AND ROOSEVELT WILBURN WERE SWORN	CKO
	AND TESTIFIED. DEFTS TRUE NAME MARK ANTHONY MITCHELL. CITY RESTS	CKO
	DEFT AND ROZALIND DIANE SMITH WERE SWORN AND TESTIFIED ON	CKO
	DEFTS BEHALF. D-1-LIST OF MOTEL RESIDENTS MARKED BUT NOT	CKO

D O C K E T

Page 2

CIRCUIT COURT - SLC

WEDNESDAY AUGUST 5, 1987

3:46 PM

Defendant  
MILLER, MARK AKA MITCHELL

CITATION:

CPR Case: 860091082 MC  
City Misdemeanor

1/87	RECEIVED. DEFT RESTS. JURY FINDS DEFT NOT GUILTY OF 32-1-11 AND GUILTY OF 32-3-8 C/O REFERRED TO AP&P SENTENCING 6-22-87 9:00 A.M.	CKO
1/87	SNT scheduled for 6/22/87 at 9:00 A in room ? with RCG	CKO
1/87	GIBSON/CKO T1314 C432 DPW LYNN DONALDSON. SENTENCE 6 MONTHS JAIL \$500 ATTY FEES \$549.23 RESTITUTION TO BE PAID TO THE COURT. ALL BUT 30 DAYS JAIL SUSPENDED ON 1 YEAR AP&P PROBATION AFTER SERVING 30 DAYS JAIL CONDITIONS 1-40 HOURS COMMUNITY SERVICE THRU JAIL ALTERNATIVE 2-RULES OF AP&P 3-VOCATIONAL & SUBSTANCE COUNSELING 4-FULLTIME EMPLOYMENT 5-DO NOT ASSOCIATE WITH PERSON USING NON PRESCRIBED DRUGS ATTY FEES & RESTITUTION STAY 12-22-87 PROBATION 7-22-88	CKO
1/87	CREATE Trust A/R # 01 Restitution	549.23 CKO
	CREATE Trust A/R # 02 Attorney Fee - City	500.00 CKO
	Began tracking Fine Stay	Review on 12/22/87 CKO
	Began tracking Probation	Review on 07/22/88 CKO
1/87	FILED NOTICE OF APPEAL	BVO
	FILED DESIGNATION OF RECORD ON APPEAL	BVO
	FILED NOTICE REGARDING TRANSCRIPT	BVO
1/87	TRANSFERRED CERTIFIED COPY OF NOTICE OF APPEAL, NOTICE REGARDING TRANSCRIPT, AND DESIGNATION OF RECORD ON APPEAL TO COURT OF APPEALS.	BVO

Payment Summary

Citation Amount: 162.50

A/R Type:	Total Due	Received	Paid
Restitution # 01	549.23		
Attorney Fee # 02	500.00		

Additional Case Data

Fine Summary

Fine: \$1049.23	Suspended:
Jail: 180	Suspended: 150

Parties

Payee # 01	
CARTOW	
27 WALKER PL	
SLC UT	Work Phone: ( ) -
Payee # 02	
SALT LAKE CITY TREASURER	

Personal Description

Sex: M	DOB:	State: UT	Expires:
Dr. Lic. No.:			

7TH CIRCUIT COURT - SLC

D O C K E T

Page 3  
WEDNESDAY AUGUST 5, 1987  
3:46 PM

Defendant CITATION:  
MILLER, MARK AKA MITCHELL

CPR Case: 860091082 MC  
City Misdemeanor

SCHEDULED HEARING SUMMARY

TRIAL	on 02/09/87	0930 A in room ? with RCG
PRE-TRIAL CONFERENCE	on 03/19/87	0930 A in room ? with RCG
PRE-TRIAL CONFERENCE	on 04/02/87	0900 A in room ? with RCG
JURY TRIAL	on 05/18/87	0900 A in room ? with RCG
SENTENCING	on 06/22/87	0900 A in room ? with RCG

TRACKING STATUS

Fine Stay  
Probation

Review Date  
12/22/87  
07/22/88

End of the docket report for this case.

STATE OF UTAH  
County of Salt Lake  
I, the undersigned, Clerk of the Circuit Court, State of Utah, Salt Lake County, Salt Lake Department do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such clerk.  
Witness my hand and seal of said Court This 5th day of August 1987  
PAUL L. VANCE, Clerk  
By A. Kimball Deputy

## ADDENDUM 3

PROSECUTORS N L E T S M E S S A G E

DATE PRINTER: 121487 09:44:27

FROM SLC1 ON 12/14/87 AT 09:43:56

CR.UTBCI0000.UT0180300.TXT. PUR/C REGID/2UT0180347 01

UT/144620 FBI/ 610863P4 SSN/318683211 FP/16 CM 10 15 17 15 10 11 13 13

NAME/ MAYFIELD, BOB/010155 SEX/F RAC/W HT/5-07 WT/140 HR/BR EYE/BA  
LESLIE C

UTAH BUREAU OF CRIMINAL IDENTIFICATION  
A-ARREST C-COURT CHARGE D-DISPOSITION

UT0180300 SORELS, 020876 A-B/W PETIT LARC 2399  
SALT LAKE CIT LESLIE C  
CDR/ MF/96018

UT0180300 SORRELS, 032485 A-FORGERY 2589

SALT LAKE PD LESLIE C (FINAL DISPOSITION)

CDR/283534 MF/080970 032485 C-FORGERY  
032485 D-CHARGE DISMISSED

ALIASES

SORELS, LESLIE C  
SORRELS, LESLIE C

TODAYS DATE: 87348 RAP SHEET INVALID AFTER: 87378

CONFIDENTIAL

USE OF THIS INFORMATION REGULATED BY LAW

M E S S A G E D I S P L A Y C O M P L E T E D .



CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of the foregoing Brief of Respondent to Lynn C. Donaldson, Salt Lake Legal Defender Association, Attorney for Appellant, 333 South Second East, Salt Lake City, Utah 84111, by depositing the same in the U.S. mail, postage prepaid, this \_\_\_\_ day of January, 1988.

---

CME:cc